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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 723

SHELDON WHEELER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Sheldon Wheeler respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit, entered in this case on January 25, 1955.

(a) OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Court of Appeals (F. R. Duffy, Chief Judge, P. J. Finnegan and E. J. Schnackenberg, Circuit Judges) is not yet reported. (See appendix pp. 1a-8a.)

(b) STATEMENT OF JURISDICTION.

(i)

The judgment of the Court of Appeals sought to be reviewed was entered January 25, 1955 (App. 2a).

(ii)

Petitioner was denied a rehearing by order of the Court of Appeals entered March 16, 1955 (App. 11a).

(iii)

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1) and Rule 19 (b) of the Rules of this Court. Specifically, a review by this Court is sought for the following reasons:

1. The decision in this case by the Court of Appeals is in conflict with decisions of other Courts of Appeal on the same matter.

2. The Court of Appeals in this case has decided a federal procedural question in a way in conflict with applicable decisions of this Court.

3. The Court of Appeals in this case has so far sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(c) QUESTIONS PRESENTED FOR REVIEW.

(i)

Whether petitioner Wheeler was given a fair and impartial trial in view of the sarcastic and prejudicial remarks made by the trial judge in the presence of the jury, indicating the court's belief that petitioner was guilty of the crime charged.

(ii)

Whether petitioner Wheeler was deprived of his constitutional rights under the 5th and 6th Amendments to the Constitution of the United States on account of the prejudicial remarks of the trial judge, constituting a denial to him of a fair and impartial trial.

(iii)

Whether the trial in this case, as affected by the sarcastic and prejudicial remarks of the trial judge and by the undue restrictions placed by the court upon the cross examination of witnesses for the government, was in conformity with due process of law as guaranteed by the 5th and 6th Amendments to the Constitution of the United States.

(d) THE CONSTITUTIONAL PROVISIONS INVOLVED.

(i)

5TH AMENDMENT—CAPITAL CRIMES; DUE PROCESS

(2A U.S.C.A. 102)

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(ii)

6TH AMENDMENT—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

(2A U.S.C.A. 327)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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(e) STATEMENT OF THE CASE.

This is a criminal action brought by the United States Government against the petitioner Sheldon Wheeler and one William McGowan under a joint indictment charging them with unlawfully transporting in interstate commerce certain stolen vehicles, knowing them to be stolen, in violation of Sec. 2312, Title 18, United States Code, and with a conspiracy to commit those offenses in violation of Sec. 371, of the same Title (R. 4-9). Petitioner Wheeler pleaded not guilty and after a trial before a jury, a verdict of guilty was entered against him, upon which the Court entered judgment of imprisonment for a term of five years and ordered him to pay a fine of $5,000. (R. 235, 237-8). On appeal the conviction was affirmed by the Court of Appeals (App. 10a).

The indictment referred to three separate automobiles alleged to have been transported separately on three occasions. A conspiracy between petitioner Wheeler and the defendant McGowan was alleged in a separate count (R. 4-7).

THE PERTINENT FACTS.

Petitioner Wheeler had resided in Chicago for about 28 years. His business was auto repossession and recovery. He did this work for banks, finance companies and loaning institutions and employed about 8 persons (R. 151). Among his regular clientele were Southmoor National Bank, Southeast National Bank, Pioneer Trust & Savings Bank, Fairbanks Finance, South Shore Finance, California National Bank, Bank of America, Security Trust & Savings Bank, Union Bank, Union Discount and Commercial Credit. His work consisted of recovering automobiles for these institutions in cases where their customers went into default (R. 172).

Wheeler owned a used car business on the vacant lot next to his office under the name of Shelley Auto Company. The defendant McGowan operated this company for Wheeler on a strictly commission basis, receiving $25 for each car bought and the same amount for every car sold (R. 152). McGowan had complete charge of purchasing and selling cars for this used car business (R. 153, 180). The business was registered with the State of Illinois as a used car dealer (R. 153).

The Shelley Auto Company followed the customary practice among used car dealers of selling some of their cars out of the State at used car auctions because in that way the best prices could be obtained (R. 77).

Wheeler was an established business man (R. 151). The government's witness Millenacker testified that he had his bank make an inquiry as to Wheeler's reputation and that he received a report back that it was very good (R. 85).

The three cars involved in this case were purchased by the Shelley Auto Company from customers in the regular course of business (R. 153, 160) and were transported to used car auctions in Minnesota and Iowa by the defendant McGowan and sold there by him (R. 55, 58, 61, 63). It is undisputed that the Shelley Auto Company received the proceeds of these sales. The average sales price was in the neighborhood of $2,000.00 and the average profit on each car about $100.00 (R. 196).

The Government offered evidence to the effect that the cars sold by the Shelley Auto Company through defendant McGowan had been stolen from their rightful owners (R. 32-35; R. 18-23; R. 23-26).

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The record is entirely silent as to the identity of the persons who stole the automobiles in question. There was no evidence offered at the trial that either the petitioner Wheeler or his co-defendant McGowan had anything to do with the stealing of the cars.

Neither was there any evidence to the effect that either the petitioner Wheeler or his co-defendant McGowan had any knowledge at the time the cars were purchased by the Shelley Auto Company, or at the time they were transported in interstate commerce, that the automobiles had been stolen. The Government's case was based on a presumption of recent possession as showing knowledge of the theft.

In the course of the trial, the district judge made remarks on a number of occasions in the presence of the jury, which could only be construed as indicating his opinion that the defendants were guilty. To save repetition, we will refer to these remarks in the argument.

(f) BASIS OF FEDERAL JURISDICTION OF THE TRIAL COURT.

The United States District Court for the Northern District of Illinois, Eastern Division, the court of original jurisdiction in this case, had jurisdiction under 18 U.S.C. Sec. 3231, giving original jurisdiction to district courts of the United States of all offenses against the laws of the United States. The offenses charged in this case were violations of 18 U.S.C. Secs. 371 and 2312 (R. 4-9).

(g) ARGUMENT.

I.

Remarks of a trial judge made in the presence of a jury bearing on the innocence or guilt of a defendant in a criminal case constitute reversible error if the remarks might reasonably influence the jury in any substantial way.

(a) A reviewing court is not permitted to speculate as to whether there was substantial influence exerted on the jury by the remarks. A serious doubt as to whether such influence was in fact exerted is sufficient to require the reversal of a conviction.

(b) Courts of appeal in the various circuits have reversed convictions on account of prejudicial remarks made by the district judge before a jury under circumstances similar to those in the case at bar. The decision by the Court of Appeals in this case is, therefore, in conflict with the decisions in the other circuits.

The Court of Appeals, in its Opinion, referred to a number of remarks made by the trial judge in the course of the trial in the presence of a jury (App. 5a-7a). In addition to the examples cited in the Opinion, the record shows the following additional instances of remarks hurtful to the case of petitioner Wheeler:

> "(Mr. Kahn): I do not have the photographer here. I didn't intend to call him. I will ask counsel if they object.
>
> "(The Court): All he can testify to then, in your opinion, is that these two pictures are accurate photographic representations of the cars in question?" (R. 138-9)

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The Court has no right to suggest in advance what a witness will testify to before the witness gives his testimony. This statement by the Court shows the bias of the Court in favor of the prosecution.

At another point, Counsel for the Government asked the petitioner Wheeler a question and then the following transpired (R. 199, 200):

"Mr. Winkler: To which he answered

"Mr. Kahn: No he has not.

"The Witness: A. I don't remember whether I was curious or not.

"The Court: Are you counsel for this defendant?

Mr. Winkler: No, but I am counsel for another defendant in this case, and this testimony—

"The Court: I wanted to be sure. I don't question your right to participate, but I want to be sure *who your client is.* (emphasis supplied).

"Mr. Berkson: No, I think you remember I represent Mr. Wheeler and Mr. Winkler represents Mr. McGowan.

"The Court: Are you critical of me, Mr. Berkson?

"Mr. Berkson: No, I think you have a very good memory.

"The Court: Proceed with the examination."

It is clear from the foregoing excerpts from the record that the remarks of the trial judge were entirely unjustified. If the court recognized the right of Mr. Winkler to participate as he said explicitly, then why did the court ask Mr. Winkler whether he was counsel for Wheeler, just after Winkler made the statement to the effect that the witness had already answered the question asked him? The remark of the trial judge that "I want to be sure who your client is" has a touch of irony in it and served the purpose of conveying the idea to the jury that both defendants had the same counsel and that, therefore, they had collaborated together in the commission of the alleged

crime of conspiracy. The record was clear as to whom Mr. Winkler represented and whom Mr. Berkson represented. There was no occasion for the court to ask Mr. Winkler "Are you counsel for this defendant." If Mr. Winkler had the right to participate as the judge conceded then there was no basis for the judge's conclusion that just because he made the statement that the witness had already answered the question, Winkler represented the witness.

The very issue in this case was whether or not a conspiracy existed between the two defendants and when the trial judge makes a remark indicating his belief that notwithstanding the fact that each defendant is represented at the trial by his own separate counsel, nevertheless, in the judge's opinion, one of the counsel represents both defendants, the judge's remarks has the effect of introducing evidence of collaboration which does not appear in the record, and which does not in fact exist. It would be hard to conceive of a single incident that would have a greater effect of depriving the defendant Wheeler of a fair trial than just such a remark of the trial judge as we have just discussed.

Another incident occurred during the cross examination of Millenacker by Mr. Berkson. The witness stated that he came to Chicago with his wife and registered at the Hotel Sherman. He was then asked if he met anybody else. There was an objection by Mr. Kahn and then the following transpired:

> "The Court: I don't know what the question means. Anyone other than who?
>
> Mr. Berkson: "Anyone other than his wife."
>
> Mr. Kahn: "I object to the question."
>
> The Court: "He said after he registered at the Sherman Hotel he saw your client *whoever it was.* (emphasis supplied).

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Mr. Berkson: "Now, if the court please, I heard that."

The Court: "All right, I just want to get the question so that the witness understands it." (R. 103).

At another time, during the cross-examination of Government's witness Gregson, the record shows the following line of questioning:

"Q. (By Mr. Berkson): Where was the secret number located?

"Mr. Kahn: Objection.

"Mr. Berkson: I think that is very material.

"Mr. Kahn: I will object to that.

"The Witness: That is very secret information, Your Honor, and it has absolutely nothing—

"Mr. Berkson: If your Honor please, I am not interested in any particular location. I just want to know where underneath the car it was.

"The Court: If you are not interested—

"Mr. Berkson: I am not interested in the exact spot.

"The Court: If you are not interested, I will certainly sustain the objection. I don't want to waste time getting information that *your own men* are not interested in. I will sustain the objection to the question." (R. 44) (emphasis supplied.)

Again during the cross-examination of the Government's witness by counsel for petitioner Wheeler, the following occurred:

"Q. There is a tax?

"A. If it is sold in Minnesota."

"Q. Was that question put to you and was that answer made?

"Mr. Kahn: I object.

"The Court: Objection sustained. Was there any testimony about tax here?

"Mr. Berkson: If the court please, this all relates to—

> "The Court: I don't care what it relates to. When that kind of cross-examination is engaged in, it can only be used for one purpose. You know what that purpose is." (R. 121)

The Court of Appeals in the case at bar in holding that these remarks are harmless has misconceived and misinterpreted the proper rule to be applied to determine whether an error involving a question of due process constitutes reversible error or harmless error. A reading of its opinion discloses that it adopts the rule that where it finds great weight of the evidence against the defendants then the error becomes a harmless error. (App. 7a)

In so misconstruing the rule, the court in effect substituted its view of the evidence for that of the jury. The question is not whether the Court of Appeals was of the opinion that the evidence justified the verdict or that there was sufficient evidence to sustain the verdict or even that the evidence against the defendants was substantial. (See Concurring Opinion of Judge Finnegan, App. 7a.) The precise issue is, on the contrary, whether or not the jury *might* have been influenced in its decision by the prejudicial remark of the Judge.

Under the rule laid down in *Bollenbach* v. *United States,* 326 U. S. 607, the mere fact that the weight of the evidence was greatly in favor of the Government does not permit petitioner Wheeler to be deprived of a trial before an impartial tribunal.

In that case, which also involved transporting of stolen property in interstate commerce, the Government took the view that there was sufficient proof to find the defendant guilty without regard to the errors in the judge's charge complained of. This Court rejected this view, stating at p. 614:

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"In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

The Court said, at pp. 614, 615:

"Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U. S. C. Sec. 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale L. J. 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. *Bruno* v. *United States,* 308 U. S. 287, 293-94; *Weiler* v. *United States,* 323 U. S. 606, 611. From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

This Court, in *Bollenbach* v. *United States,* just cited, was merely putting in other words the long established

principle of criminal law that even a guilty man is entitled to a fair trial by an impartial tribunal. This is all the more so in a case like the one at bar where the evidence was highly conflicting and where the jury could well find Wheeler innocent if the trial had been given an impartial atmosphere.

The Court of Appeals in the case at bar gave no consideration to the question as to the effect of the remarks of the trial judge on the minds of the jury. The Court took it for granted that the jury was unaffected by these remarks. In so doing, the Court of Appeals failed to give consideration to the test to be used in determining whether errors are harmless or prejudicial.

It is submitted that the Court of Appeals in this case decided a procedural question, namely, when remarks of a trial court constitute reversible error, in a way that is in conflict with the established decisions of this Court. For example, in *Kotteakos* v. *United States,* 328 U. S. 750 (1946), the court said, at page 765:

> "The inquiry cannot be merely whether there was enough to support the results, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The Court of Appeals in the case at bar took the contrary position, namely, that just because there was sufficient evidence in the record to convict, it was immaterial that the judge made prejudicial remarks.

In the *Kotteakos* case just cited, the court went further and held that where the departure from proper procedure was from a *constitutional norm,* a reversal would have to follow even though the evidence of guilt might be clear.

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In the case at bar the constitutional norm that was violated was a failure of due process guaranteed under the Fifth and Sixth Amendments to the Constitution of the United States. It follows, therefore, that even if it might be said that the evidence showed the defendants to be clearly guilty, nevertheless, a violation of the Constitution should not be tolerated, and the judgment of conviction should be reversed.

In the case of *Tumey* v. *Ohio,* 273 U. S. 510, 535 (1927), the court said:

> "It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined $100.00 which was the minimum amount, and therefore that he cannot complain of a lack of due process either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. *No matter what evidence was against him,* he had the right to have an impartial judge." (Emphasis supplied.)

The views of the Court of Appeals in this case run *contra* also to those in other Circuits as shown by the following authorities:

In the case of *United States* v. *Minuse,* 114 Fed. (2d) 36, 38 (CCA 2d, 1940), the court said:

> "Both defendants have appealed. *In spite of the very strong case presented* against them, we are constrained to hold that they did not get a fair trial and that accordingly the judgments must be reversed." (Emphasis supplied.)

In *United States* v. *Brandt,* 196 Fed. (2d) 653, (C. A. 2d, 1952), the court found that there was substantial evidence to take the case to the jury, but that the judge's conduct required a reversal.

In *United States* v. *Link,* 202 Fed. (2d) 592 (C.A. 3d, 1953) a prosecution for income tax evasion, the court

found that there was ample evidence to support the jury's verdict of guilty and that the factual dispute was a "fragile one". Nevertheless, the Court of Appeals reversed the conviction because of a statement made in one of the instructions of the court, which might have been construed by the jury as an indication that the trial judge believed the defendant to be guilty.

The case of *United States* v. *Claudy*, 204 Fed. (2d) 624 (C.A. 3d, 1953), is not in accord with the decision of the Court of Appeals in the case at bar. There the Court said (p. 627):

> "In determining whether the procedure by which a state has determined the guilt of an accused person squares with the requirements of due process, the Supreme Court has repeatedly taken the position that the question whether the accused was in fact innocent or guilty of the crime charged is irrelevant and not to be considered."

The court went on further to say that the requirements of due process even in a civil case must be met, irrespective of the merits of the case. It cited the example of a personal judgment in a federal case which would have to be vacated if it was entered without giving the defendant notice and a reasonable opportunity to be heard, and that the defendant would not be required to show as a condition precedent to the vacating of a judgment that he has a substantial defense.

In *Gomila* v. *United States,* 146 Fed. (2d) 372, 373, 374 (C. C. A. 5th, 1944) a judgment of conviction for a violation of the Internal Revenue Code was reversed by the Circuit Court of Appeals for the 5th Circuit. The court commented upon the right of the trial judge to call and question a witness who was not used by either party, but pointed out that in so doing, the court should be careful

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to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that the defendant was guilty. The court said (p. 374):

> "The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part."

In *Braswell* v. *United States,* 200 Fed. (2d) 597, (C.A. 5th, 1952) the rule as to what guide is to be used to determine whether remarks constitute reversible error or harmless error. The court said, at page 602:

> "The right to trial by jury comprehends a fair determination of the guilt or innocence of the accused, free from bias, passion or prejudice. See *United States* v. *Haupt,* 7 Cir., 136 F. 2d 661. And where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. See *Little* v. *United States,* 10 Cir., 73 F. 2d 861, 866, 96 A.L.R. 889; cf. *Kotteakos* v. *United States,* 328 U.S. 750, 763-765, 66 S.Ct. 1239, 90 L. Ed. 1557."

The court concluded that the defendants were denied their constitutional right to a fair and impartial trial and reversed the conviction.

In the case of *Wardlaw* v. *United States,* 203 Fed. (2d) 884 (C.A. 5th 1953), the Court of Appeals for the 5th Circuit reversed the conviction because it was of the opinion that the remarks of the court in the presence of the jury affected their consideration of the defense presented that the defendant did not have the necessary criminal intent to commit the crime charged.

In the case of *Meeks* v. *United States,* 163 Fed. (2d) 598 (CCA 9, 1947), the Court stated, at page 602:

> "Apart from these three errors, it is true that there was other evidence strongly adverse to appellant which the jury may or may not have believed. However, the Supreme Court does not permit an appellate court to speculate as to what witnesses the jury would believe or disbelieve. Indeed, in view of the fundamental character of these errors *we may not affirm, even if we are 'without doubt' of appellant's guilt.* Citing *Bollenbach* v. *United States,* 326 U. S. 607, 614, 615, 66 S.Ct. 402, 406, 90 L. Ed. 350." (Emphasis supplied.)

In *Robertson* v. *United States,* 171 Fed. (2d) 345 (C.A. Dist. of Columbia, 1948), the trial judge stated in the presence of the jury after the evidence was completed, as follows:

> "I want to say this: When this goes to the jury, I gave you an opportunity to dispose of this case. You remember that now."

The judgment of conviction was reversed, even though there was no objection made to the remark at the time it was made, objection having been made for the first time on appeal.

While it may not be possible to single out any one particular remark of the trial judge and conclude that that one remark was sufficient to prejudice the minds of the jurors, nevertheless, all the remarks taken together as a whole might well have swayed them. This was the view taken by the court in *Egan* v. *United States,* 287 Fed. 958 (C.A. Dist. of Columbia, 1923), where the court in reversing a conviction stated, at page 971:

> "Numerous other exceptions were noted to the conduct of the trial judge in ruling upon the admissibility of evidence and commenting thereon in the

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presence of the jury. In other words, these exceptions challenge the demeanor of the judge toward defendant. While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of defendant were so prejudiced thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime. The trial judge should be so impartial, in the trial of a criminal case, that by no word or act of his may the jury be able to detect his personal convictions as to the guilt or innocence of the accused."

In *Peckham* v. *United States,* 210 Fed. (2d) 693, 703, C.A. Dist. of Colum. (1953), the Court relied on *Krulewitch* v. *United States,* 336 U.S. 440, 444-445; *Kotteakos* v. *United States,* 328 U.S. 750 and *Bollenbach* v. *United States,* 326 U.S. 607, in support of their conclusion that because of the disorderly atmosphere of the trial, it would require too great a degree of speculation to say that the defendant was fairly tried. In that case there were a number of altercations between the court and defense counsel and the judge expressed no opinion as to the guilt of the defendant; nevertheless, the hostility he displayed toward defendant's counsel served to influence the jury into believing that the judge was of the opinion that the defendant was guilty.

The majority opinion by Duffy, *Chief Judge,* in the case at bar agrees with the position taken by Wheeler that the remarks constituted error. The opinion, however, concludes that the error is harmless because of the great weight of the evidence in favor of the Government. This is equivalent to stating that a guilty defendant (assuming the defendant is in fact guilty) is not entitled to a trial before an impartial judge.

The concurring opinion of Judge Finnegan was devoted entirely to the question of the sarcastic and prejudicial remarks of the judge. Judge Finnegan characterized the trial judge as a "caustic critic" and stated that in that role he "skirts the border of partisan participation" (App. 8A).

In order to properly appraise the evidence in this case, it must first be borne in mind that petitioner Wheeler was not charged with the transportation of a stolen automobile in interstate commerce, but with *knowingly* so doing. Before Wheeler could properly have been convicted, the jury must have found that he had *knowledge* that the cars in question had been stolen. The statute under which he was indicted requires such knowledge (18 U.S.C. Secs. 371 and 2312).

It is significant that in spite of the fact that the Court of Appeals, in its Opinion, found that there was a great weight of evidence pointing to the guilt of Wheeler, nevertheless, *not one word in the Opinion refers to any guilty knowledge* on his part that the automobiles were stolen.

We point this fact out not because we are asking this Court to review the facts of the case in order to make any findings of fact different from those found by the Court of Appeals. Our reason goes to a different point, namely, whether or not the prejudicial and sarcastic remarks of the trial judge could have reasonably influenced the jury in their verdict on such an important factual question as guilty knowledge on the part of Wheeler.

Wheeler argued in his brief filed in the Court of Appeals that as to Count 4, there was a total failure of proof because the evidence showed that the car was stolen November 15, 1950 (R. 24) while the indictment charges

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Wheeler with having caused it to be transported in interstate commerce on August 23, 1950, almost three months before it was supposed to have been stolen (R. 6). The Government in its brief filed in the Court of Appeals answered by confessing error as follows:

> "Count 4. The arguments of defendants rest completely on what appears to be an error in transcription. If it is shown that Kessler's testimony was that his car was stolen on August 15, 1950, rather than November 15, their argument must fall. If, however, the transcript is correct, we will not burden the court with fruitless argument but will simply admit to a failure of proof on that count."

There was no basis for the assumption that the date of November 15, 1950 was an error in the transcription of the record. Surely counsel for the Government would not have admitted a failure of proof unless he was satisfied that the record was correct. This confession of error is an illustration of how the jury was so influenced by the judge's remarks and conduct of the trial of the case generally, that it found Wheeler guilty on all counts of the indictment, including Count 4 (R. 235). If it was misled as to Count 4, it could very well have been misled on all other counts.

II.

The 5th and 6th Amendments to the Constitution of the United States guarantee to every defendant in a criminal prosecution a fair and impartial trial. Due process of law would otherwise be lacking.

Even assuming for the sake of argument that petitioner Wheeler was guilty, nevertheless he is still entitled to the protection of this Constitutional guarantee.

In the case of *Stroble* v. *California*, 343 U.S. 181, the court, in emphasizing the importance of proper judicial

procedure even though a defendant is guilty, stated, at p. 202:

> "If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion."

In *Go-Bart Co.* v. *United States*, 282 U.S. 343, the Court, in referring to the Constitutional protection against unreasonable searches and seizures stated, at p. 357:

> "It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent. * * *"

It has thus been clearly established by this Court that Constitutional guarantees are extended to guilty persons as well as innocent ones. This, of course, includes the right to an impartial trial.

In *Tumey* v. *Ohio*, 273 U.S. 510, 535, this Court said:

> "No matter what the evidence was against him, he had the right to have an impartial judge."

In *Lee* v. *Fleming*, 158 Fed. (2d) 984 (United States Emergency Court of Appeals 1946), the court at page 988, referred to the "*fundamental concept of due process of law* that parties to controversies are entitled to have them determined by an *impartial tribunal*." (Emphasis supplied.)

In *Jordan* v. *Massachusetts*, 225 U.S. 167, 176, this Court said:

> "Due process implies a tribunal * * * impartial. * * *"

In *Hunter* v. *United States*, 62 Fed. (2d) 217, (CCA 5th, 1932), the court said, at page 220:

> "It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant *however guilty* he may be should be convicted." (Emphasis supplied.)

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The guarantee of due process also includes the right to cross-examine witnesses. Although the Court of Appeals, in its Opinion, stated that the trial judge did not abuse his discretion in limiting cross-examination of the Government's witnesses (App. 5a), the record in this case is to the contrary.

On direct examination, Police Officer Hinkens, a witness for the Government, testified that he had a conversation with Wheeler on January 5, 1951, at the detective bureau in Chicago, and then again on January 9, 1951, at the State Attorney's office. (R. 122, 123, 126, 127). Then on cross examination, the witness was asked by Mr. Berkson, counsel for Wheeler, whether January 5, 1951, was the first time he had ever spoken to Wheeler and also whether he talked to him after January 9, 1951, and on how many occasions after that date. (R. 132, 136). Objections were made by the Government on the grounds that those questions were beyond the scope of the direct examination because the witness was not asked about those other conversations on direct. The court sustained the objection.

It is obvious that the court unduly limited the right of cross examination. Certainly the *subject matter* of the direct examination can be gone into on cross, in a thorough manner, and if it is necessary to ask a witness a question concerning a date not mentioned in the direct examination but having reference in some way to the subject matter of the direct examination such a question would be material. For example, it may have been that on the other dates inquired into from the witness on cross examination, something might have transpired which would have affected that which occurred on January 5, or January 9, 1951. It may have been that on other dates, the witness in other conversations with Wheeler, made statements

to him which contradicted his testimony. How can cross examination be pursued to the fullest extent permitted by law if the door is shut at the very beginning just because a date is mentioned which was not mentioned on direct examination, and before the court and the jury have had the opportunity to hear what transpired on those other dates?

Witness Millenacker, testified for the Government on redirect examination as to the reason why he skipped titles on some cars and not on others. He explained that "skipping a title" means taking an assignment on a title from a seller in blank and using the same title in a resale of the car without showing the dealer's name as an intermediary. He said he skipped titles on out-of-state cars but not on Minnesota cars. He said that in Minnesota, the dealer has the right to hold a car for seven days before purchasing Minnesota plates. (R. 116). Then on re-cross examination Millenacker was asked a series of questions which were asked of the same witness previously at a deposition hearing in 1952. (R. 118, 119) The questions indicated that at the deposition hearing, the witness stated a different reason why he skipped titles in Minnesota. The court sustained an objection to the question asked as to whether or not the witness did in fact make such an answer at the deposition hearing, and also sustained objections to a series of questions immediately following on the same subject. (R. 119). The reason given by the court for sustaining the objections was that the questions did not tend to impeach the witness. The court evidently took the very narrow position, that every individual question must *in itself* serve to impeach the witness. This is an undue restriction on cross examination and violates the rule of wide latitude permitted in cross examination.

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At another point in his direct examination Millenacker, testifying for the Government, stated that when he met McGowan for the first time, McGowan told him his name was Sheldon Wheeler, (R. 56). He said McGowan gave his his Chicago telephone number and when he called that number he always asked for Shelley Wheeler. (R. 66). He said when he did this, McGowan got on the phone. (R. 67). He said he did not know at the time he bought the three cars from McGowan (on August 23, October 6, and November 8, 1950) what McGowan's real name was. He said he thought his name was Shelley Wheeler (R. 67). Then Millenacker said that when he called Chicago in December 1950, he didn't talk to McGowan but to Wheeler and that Wheeler told him he was Shelley Wheeler's son. (R. 67, 68)

With this state of the record, counsel for Wheeler attempted to show that at a deposition hearing in a civil case on August 4, 1952, about a year and a half before the trial, Millenacker answered certain questions under oath in which he stated that he knew he was dealing with McGowan by his *real* name and not by the name of Wheeler.

On cross examination, Millenacker was asked whether at that deposition hearing he was asked the following questions and whether he made the following answers to them:

"Q. And what happened then?

"A. I bought the car before it went through the sale.

"Q. And then what happened:

"A. And he said, McGowan, at the time told me he was a representative of the Shelley Auto Co.

"Q. Did he show you any papers to show that he was?

"A. He had a dealer's certificate if I remember right.

"Q. What did it say?

"A. Shelley Auto Company, a dealer's number. He had a little square card." (R. 95).

Counsel for the government objected and the court sustained the objection. The Court stated:

> "The Court: It does not actually tend to impeach anything this witness has said."

The record then shows the following:

> "Mr. Winkler: It certainly does.
> "The Court: I don't agree with you.
> "Mr. Winkler: He testified that McGowan told him he was Shelley. Now, here, he is testifying McGowan told him he was McGowan.
> "The Court: I do not perceive that is what Mr. Berkson read. If you want to go over it, I will. He said he had a little red card of the Shelley Motor Co.
> "Mr. Berkson: If the Court please, if you will allow me to put these questions and answers—
> "The Court: No, I have ruled.

Millenacker was then asked by Mr. Berkson whether the following question was put to him and whether he made the following answer at the deposition hearing.

> "Q. Who was that from?
> "A. Mr. McGowan called me about two weeks later, a week or two after I bought the De Sota and said he had this Chrysler for sale. He told me the price and I told him I would call him back on it and let him know on it."

The question was objected to and the Court sustained the objection. (R. 102). This was error. The answer showed that the witness knew he was dealing with McGowan and not with Wheeler as he testified on direct examination. It was therefore material for purposes of impeachment.

The Court again took a very narrow view on the question of what constitutes impeachment. More latitude than the Court was willing to grant should be permitted in order to bring out all the facts. Particular questions taken out of their context from a deposition transcript might

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be meaningless but the same questions would have real meaning when placed in the proper setting. Certainly, preliminary questions are often necessary to establish the setting. The Trial Court evidently did not recognize this requirement because the Court asked Mr. Berkson to state one question at a time and he would rule on each question as made, as to whether that particular question constituted impeachment. (R. 100).

Later in the trial an offer of proof was made by Wheeler that if the witness Millenacker were asked whether the following question was asked him at the deposition hearing and if he made the following answer he would have said, "Yes.";

> "Q. And then what happened?
>
> "A. And he said, McGowan, at the time told me that he was a representative of the Shelley Auto Company." (R. 114)

The objection of the Government to the offer of proof was sustained. This ruling was erroneous. The question was proper because it served to impeach the testimony of the witness given at the trial that McGowan told Millenacker he was Wheeler and not McGowan.

The right of cross examination is not a discretionary right given to litigants. It is an absolute right and the courts can control it only to prevent abuse. The rule was laid down in the leading case of *Alford* v. *United States*, 282 U. S. 687, 692 (1931). This case has been cited extensively for the general rule that a party litigant is entitled to reasonable cross examination as a *matter of right.* In that case this Court said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of

his inquiry does not, in general, apply. (Citing cases) It is the essence of a fair trial that reasonable latitude be given the cross examiner even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." (Citing cases.)

The court concluded that the defense was entitled to a reasonable cross examination *as a matter of right* and the restrictions of the court constituted an abuse of discretion and prejudicial error.

In the case of *Heard* v. *United States,* 255 F. 829, 832 (CCA 8th 1919) a criminal prosecution for the crime of stealing from a mail shipment, the court said:

> "It is no answer to a refusal to permit a full cross examination that the party against whom the witness is called might have made him his own witness, and might then have proved by him or by some other witness, or by some writing, the facts which the cross examiner was entitled to draw from the testimony of his adversary's witness. No one is bound to make his adversary's witness his own, to prove facts which he is lawfully entitled to establish by the cross examination of that witness * * * full cross examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."
>
> "The scope of the proper cross examination is determined by the *subject matters* of the direct examination and *not by the precise questions* or answers relative to such matters in the direct examination." (emphasis supplied)

In the case of *Dickson* v. *United States,* 182 F. (2d) 131, 134 (CA 10th 1950) the defendant Dickson was convicted

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of falsely pretending to be an officer of the United States and the defendant Stewart of aiding and abetting him. Both defendants were found guilty.

Two witnesses, husband and wife, testified for the Government to the effect that the defendant Dickson came to the door of their home and the defendant showed Mr. Welz, the husband, a star and said he was a Federal Officer and that he was going to take Mr. Welz downtown concerning an income tax deficiency.

On cross examination, the defendant's attorney sought to interrogate Welz with respect to the conversation they had at the door before Mrs. Welz came there, as well as the conversation they had on the way to Denver. Objection to this cross examination was sustained on the ground that the Government had not asked Welz about these two conversations, but only about the one Welz testified to on direct examination.

The court pointed out that the issue in the case was whether the defendant represented himself to be a Federal officer or a State officer, the defendant claiming the latter. The court said that in the conversations sought to be brought out on cross examination it might be disclosed that the defendant made the statements that he was a State officer and not a Federal officer, and that such statements were therefore material to his defense. At page 134 the court said:

> "By asking him about one element of the transaction, the government opened the door and could not thereafter prevent exploration of the full subject by not asking him concerning the representations that were made to him in that conversation."

To the same effect are: *Cossack* v. *United States*, 63 F. (2d) 511-516, (CCA 9th, 1933), *United States* v. *Michener*, 152 F. (2d) 880, 884 (CCA 3rd 1945), *Minner* v.

United States, 57 F. (2d) 506, 511, (CCA 10th, 1932), *Lindsey* v. *United States,* 133 F. (2d) 368, 369.

It thus appears that the decision in the case at bar on the question of cross examination is contrary to the holdings in the 3rd, 8th, 9th and 10th Circuits.

The 5th and 6th Amendments to the Constitution of the United States guarantee an impartial trial. We are therefore dealing with something more than just procedure. We are dealing with substantial Constitutional rights.

The Fifth Amendment to the Constitution of the United States guarantees that:

> "No person shall be * * * deprived of life, liberty or property, without due process of law; * * *."

The Sixth Amendment to the Constitution of the United States requires that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

The remarks of the trial judge and his undue restriction of cross-examination amounted to a denial of due process as guaranteed by the Constitution.

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CONCLUSION.

We have shown not only that the Court of Appeals in this case did not follow the established law laid down by this Court, but also that the decision in this case is in conflict with decisions in similar cases in a number of Courts of Appeal. In addition, this case establishes a dangerous precedent in criminal procedure, namely, the injection of partiality in the conduct of a trial which cannot be countenanced by this Court.

We are dealing in this case with a person's liberty. As the court said in *United States* v. *Antonelli Fireworks Co., Inc.*, 155 Fed. (2d) 631, 642 (C.C.A. 2nd):

> "* * * We must be acutely sensitive to errors affecting human rights and freedom; * * *."

It is respectfully submitted that the Writ should be granted.

DAVID H. GREENBERG,
Attorney for Petitioner.

JEROME BERKSON,
MILTON K. JOSEPH,
Of Counsel.

APPENDIX I.

Consolidated Nos. 11156-11157.

OCTOBER TERM, 1954, JANUARY SESSION, 1955.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
SHELDON WHEELER AND WILLIAM McGOWAN,
Defendants-Appellants.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

January 25, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

DUFFY, *Chief Judge.* In Counts 2, 3, 4 and 5 of the indictment defendants Wheeler and McGowan were each charged with violating the Dyer Act in that each of them transported or caused to be transported in interstate commerce an automobile described in the indictment, knowing the same to have been stolen. Count 6 charged a conspiracy to violate the same statute. Count 2 charged the transportation of a stolen 1950 Chrysler from Chicago to Austin, Minnesota; Count 3, the transportation of a stolen 1950 Pontiac from Chicago to Austin, Minnesota; Count 4, the same offense as to a 1950 DeSoto from Chicago to Mason City, Iowa; Count 5 was dismissed on motion of the government. The jury found each defendant guilty as charged and each was sentenced to imprisonment for 5 years and to pay a fine of $5,000.

The sentence imposed upon the jury verdict of guilty was such that if the evidence is sufficient to sustain the convic-

tion on any one count, the judgment of conviction herein must be sustained, *Butler* v. *United States,* 7 Cir., 138 F. 2d 977, 981; *United States* v. *Kelly,* 7 Cir., 186 F. 2d 598, 602, assuming, of course, that the defendants had a fair trial, free from prejudicial error. We shall, therefore, first consider the proof as to Count 2 which refers to the 1950 Chrysler.

Sidney Peven, son of Joe Peven, testified that his father's 1950 four door Chrysler automobile, Motor No. C-4831166, had disappeared from in front of their home in Chicago on September 20, 1950, and that neither he nor his father had given anyone permission to take or use the automobile.

Witness Harkness also testified with reference to the 1950 Chrysler, and his testimony is vigorously assailed by each defendant. They claim that Harkness testified as an expert witness, but had shown no qualifications therefor. Undoubtedly, his testimony was damaging to each defendant. For more than thirty years Harkness has been a special agent for the National Automobile Theft Bureau. He explained that the Theft Bureau maintained records of practically every automobile reported stolen in the United States, and that his job was to assist law enforcement officers in identification of stolen automobiles where the identification numbers had been altered. Over repeated objections he explained that automobile manufacturers stamp motor and serial numbers in locations in each automobile which are well known, but that they also stamp the same number in each automobile in a secret location so that if the original public numbers are eliminated or changed the automobile can still be identified by him or members of the FBI who know the locations of the secret numbers. He further testified that after a manufacturer once uses a certain number for identification on an automobile, the same number is not again used. Harkness then testified that the 1950 Chrysler described in Count 2 had been examined by him at Brainerd, Minnesota; that the public numbers had been filed off and a new number C-4861744 had been substituted; that his examination

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showed the secret number was C-4833166 which was proved to be the identifying number of the 1950 Chrysler which had been owned by Joe Peven of Chicago.

All of the foregoing testimony was clearly relevant and admissible and objections thereto were properly overruled. But, say defendants, some of Harkness' expert testimony indicated that the defendants were guilty of the offenses charged. To illustrate, Harkness was asked: "Why would anyone want to disguise the identification of an automobile?" and he answered: "Because if it was a stolen automobile, they would have to change the number in order to get it registered so that they could sell it." Defendants insist that by the use of the word "they" Harkness implied that the two defendants in the case at bar had made changes in the identification of the numbers of the automobiles described in the indictment. We think the objection is far-fetched and without merit.

Leo Reddington, bookkeeper of B & J Motors, Beloit, Wisconsin, was shown an application for a State of Wisconsin Motor Vehicle Registration dated September 5, 1950 which showed B & J Motors as the seller and one Donald Carter as the purchaser of a 1950 four door Chrysler. The motor number stated on the application was C-4861744. Reddington testified the records of B & J Motors did not disclose the sale of an automobile of that description to Donald Carter or anyone else, and further, that he could not recognize the purported signature of the seller.

The proof further disclosed that Orville Millenacker purchased a 1950 four door Chrysler, Motor No. C-4861744, from the defendant McGowan to whom he paid cash in the sum of $500 and turned over a check for $1300 payable to Shelly Motor Co. Proof further showed that defendant Wheeler endorsed the $1300 check. Defendant's own proof showed that defendant Wheeler owned a used car business operated under the name of Shelly Motor Co., and that defendant McGowan operated same for him on a commission basis.

Because the evidence clearly supports the judgment of conviction on Count 2, detailed evidence need not be stated

as to the proofs supporting Count 3 (1950 Pontiac) and Count 4 (1950 DeSoto). Suffice to say, in each case it was proved that the described automobiles were stolen, and that the public numbers had been changed. Proof was then made as to the secret number of each automobile, that sales thereof were made by the defendant McGowan in Minnesota and in Iowa, that checks were taken by McGowan payable to Shelly Motor Co. or Shelly Auto Co., and that said checks were cleared in due course through the banks.

As to Count 6, the conspiracy charge, it is sufficient to point out that Wheeler testified that he and McGowan were associated in the purchase and sale of the three automobiles described in the indictment, each of which the government proved was stolen, and shortly thereafter said automobiles turned up in Minnesota and Iowa in the possession of the defendant McGowan.

We think the evidence clearly supports the jury's finding of guilt as to each defendant on Counts 2, 3, 4 and 6. We proceed, therefore, to consider the alleged errors. As we have heretofore discussed the testimony of Harkness, no further reference thereto need be made.

We have considered the claims of the defendants that error was committed because of the receipt of incompetent and prejudicial evidence. The principal objection in this category is with reference to the testimony of Leo Reddington and C. William Bladon. Reddington, the bookkeeper of B & J Motors, testified that B & J Motors did not sell a 1950 Chrysler described in the indictment to one Donald Carter. Bladon, the proprietor of Bladon Motors, testified that his Company did not sell a 1950 Pontiac described in the indictment to any one. Bladon also testified that the purported signature on the application for Wisconsin Motor Vehicle Registration under the typewritten words "Bladon Motors" was not the signature of anyone working for him, and that there was no such person as "J. Bladon, Jr.", which name appeared on the registration application.

Defendants contend that neither Reddington's nor Bladon's testimony should have been received because the

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books and the records of each company were the best evidence as to whether such sales had been made. This objection clearly has no merit as to Bladon's testimony. While he admitted, on cross examination, that he had examined the books and records of his Company about a week before the trial, he positively stated on the stand that he was testifying from his own knowledge.

The following appears in Reddington's testimony: "Q. Did the B & J Motors ever sell a Chrysler of that serial number to Donald Carter? A. No, sir. Q. Did they sell a Chrysler of that serial upmber to anyone? A. No, sir." True, Reddington testified that he had looked over the inventory cards of B & J Motors about one week previous to the date of the trial and, undoubtedly, such examination re-assured his understanding and refreshed his memory that a sale of the Chrysler described in the indictment had not been made to the fictitious person, Donald Carter, on or about September 5, 1950. No demand or request was made for the production of the inventory cards. Upon request the District Court would, undoubtedly, have required their production. The best evidence rule has some limitations. The original document is, of course, the best evidence of its contents, but what is the best evidence of the non-existence of a document? We do not think there was error in admitting Reddington's testimony, certainly no prejudicial error.

We also hold there was no undue restriction upon defendants' right to cross examine government witnesses. The extent of such cross examination is in the discretion of the trial judge. We will review only to determine whether there has been an abuse of discretion. We find no such abuse here.

However, we must discuss briefly the claim of the defendants that sarcastic and prejudicial remarks of the trial judge made in the presence of the jury deprived the defendants of a fair and impartial trial.

Each defendant was represented at the trial by his own attorney. It would seem that there was no occasion for the trial judge to be confused as to which attorney repre-

sented each defendant. However, on a number of occasions the trial judge interrupted McGowan's attorney asking which defendant he represented. The defendants claim that such remarks were extremely damaging to them especially upon the charge of conspiracy, that the court implied that defendants were operating in concert, even in the court room to such an extent that the Judge could not tell which attorney was representing each defendant.

When witness Kessler was on the stand, Wheeler's attorney asked whether he had ever seen Wheeler before the trial. The government objected and the court said (R. 25) "Sustained. That is the sort of thing you did not want to go into, Mr. Berkson. If you want to keep it brief, we will keep it brief for you. We will narrow the issues."

Defendant Wheeler contends that this remark was sarcastic, uncalled for and prejudicial, especially in view of the fact that nowhere previously had Mr. Berkson requested that the trial be kept brief. Each defendant claimed it showed another instance of the trial judge's hostility toward the defendants.

Attorney Berkson had finished reading a number of questions and answers from a deposition preparatory to asking a witness whether those questions had been asked of him, and whether he had made those answers. The government objected, and the trial judge said: "I was waiting for the objection. I will sustain the objection." Counsel for Wheeler summarizes his claim of error due to the conduct of the trial judge by saying: "In many instances throughout the record the trial judge exhibited evidence of hostility and antagonism toward counsel for the defendants. By comparison, the court's attitude to counsel for the government was one of overwhelming approval of everything he did, even to the extent of putting words into his mouth, giving him reasons to assign and even helping out the government's witnesses by stating what the court believed the witness meant in cases where the answers of the witness were confusing."

It is, of course, the duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impar-

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tiality, and to conduct the trial in an orderly way with a view of eliciting the truth and of attaining justice between the parties.

We think it was error to volunteer the statement in the presence of the jury that the objection which the government finally made was the one the trial judge had been waiting for, and he apparently sustained the objection with considerable vigor and enthusiasm. We think it appropriate to repeat what we said in *United States* v. *Levi*, 177 F. 2d 833, 836: "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr* v. *United States*, 153 U. S. 614, 626, and jurors are ever watchful of the words which fall from him. 'The judge occupies a position of great influence with the jury in conducting a trial; * * * he should be careful not * * * to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts.' *Virginian Ry. Co.* v. *Armentrout*, 4 Cir., 166 F. 2d 400, 405."

We recognize that a judge conducting a jury trial in the Federal Court is not a mere moderator, *Quercia* v. *United States*, 289 U. S. 466, 469, and appellate courts must guard against the magnification on appeal of instances which were of little importance in their setting. *Glasser* v. *United States*, 315 U. S. 60, 83. We have concluded that in view of the great weight of the evidence in the case at bar pointing to the guilt of each defendant, that the errors were harmless in this case and that judgment of conviction should be

AFFIRMED.

FINNEGAN, *Circuit Judge*, concurring. Since these convictions rest squarely upon substantial evidence, *United States* v. *Thayer*, 209 F. 2d 534 (7th Cir. 1954), traced in a record free of reversible error, I approve this affirmance. I would add, however, some comments because of certain overtones implicit in the arsnecript.

According to common experience few shafts strike deeper into jurors' minds, during trial, than words spoken by the presiding judge. It is also perfectly clear that the

practical repercussions of his various utterances cannot always be clearly traced to and through jury verdicts. Yet trial judges possess such flexibility as may be necessary for properly performing their functions. The core problem of a trial judge lies in striking and maintaining that delicate balance between himself and the triers of fact. Since the metes and bounds of judicial conduct, during a trial by jury, are difficult to delineate, much less to reduce to a concise simple formula, I think it is worth underscoring some of its aspects when appropriate instances arise.

Here, the district judge's remarks were more impertinent, than prejudicial. I am satisfied that no impingement on the defendants' rights resulted from the judge's unsuitable phraseology. When a trial judge assumes the role of a caustic critic he skirts the border of partisan participation.

SCHNACKENBERG, *Circuit Judge*, concurring.

I believe the District Court committed errors in permitting government witnesses Reddington and Bladon to give certain material testimony on direct examination, over objection, inasmuch as it appeared that such testimony was based upon what they had learned from examining certain records. The records were not introduced into evidence nor was there any showing that they were unavailable. The records were the best evidence and the testimony of the witnesses was secondary evidence. The government showed no reason for the non-production of the best evidence.

However, in view of the other evidence in the record showing the guilt of the defendants, these errors were not prejudicial and do not require a new trial.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX II.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, January 25, 1955

Before

HON. F. RYAN DUFFY, *Chief Judge*

HON. PHILIP J. FINNEGAN, *Circuit Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 1156

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* SHELDON WHEELER, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby

AFFIRMED.

APPENDIX III.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, March 16, 1955

Before

HON. F. RYAN DUFFY, *Chief Judge*

HON. PHILIP J. FINNEGAN, *Circuit Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11156-57

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* SHELDON WHEELER, WILLIAM McGOWAN, *Defendants-Appellants.*	Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby,

DENIED.

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APPENDIX IV.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Tuesday, March 22, 1955
Before

HON. F. RYAN DUFFY, *Chief Judge*

No. 11156

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* SHELDON WHEELER, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for defendant-appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed for a period of thirty (30) days pursuant to the provisions of Rule 25 of the Rules of this Court.